IN THE

Supreme Court of the United States

(18920)

THE CITY OF SEATTLE, *Appellant*, vs. DANIEL KELLEHER, Administrator of John W. Thompson, deceased, *Respondent*.		No. 274

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES, DISTRICT OF WASHINGTON, NORTHERN DIVISION.

BRIEF OF APPELLANT.

STATEMENT OF THE CASE.

W. C. Hill and Alice S. Hill, his wife, were, on the 30th day of August, 1890, and for a long time prior thereto, the owners of a tract of land, consisting of about one hundred acres, situated within the corporate limits of the City of Seattle, lying between the Maynard Donation Claim on the west, and the Jackson Street Addition on the east. The Maynard Donation Claim and the Jackson

Street Addition were platted additions to the City of Seattle, and among the streets in those two additions was a street running east and west called Weller street. The distance across the tract of land owned by Hill from Weller street in the Maynard Donation Claim, to Weller street in the Jackson Street Addition, was about 2500 feet.

In May, 1889, W. C. Hill submitted to the City Council a plat of said one hundred acre tract, showing a continuation of Weller street across said tract of land from the easterly boundary of Maynard's Donation Claim to the westerly boundary of Jackson Street Addition. This plat showed the tract divided into lots and blocks, streets and alleys; among the streets appearing thereon were Washington and King streets, running parallel with Weller street, and being extensions of streets of those names already existing upon the Maynard Donation Claim. This plat was executed with all the formalities required by the laws of the State of Washington, and submitted to the City Council for its approval. (Record, pp. 9, 10, 147; Exhibit 1, not printed.)

After the approval of this plat, Hill omitted to have it filed for record in the County Auditor's office, but took it to Washington, D. C., and had a large number of lithographic cuts made of it, which were sent to Seattle and kept in an office maintained by him there, and a number of them distributed among the real estate agents of the City of Seattle. (Testimony of W. L. Meredith, pp. 98 to 109.)

In August, 1889, Hill, with other property owners on Weller street, signed a petition to the Council of the City of Seattle, asking that Weller street be extended and graded from Elliott Bay to the west line of Jackson Street Addition, which would include the entire length of Weller street across the hundred acre tract above mentioned.

(Record, pp. 16, 47 and 148.) This petition was favorably acted upon by the City Council. Pursuant thereto the City Council on the 10th day of February, 1890, duly passed Ordinance No. 1285, providing for the grading and sidewalking of Weller street, from Fifth street to Jackson Street Addition. (Record, pp. 2, 53 and 142.) Thereupon the contract was let for the work and the work was completed some time prior to the 12th day of March, 1891. (Record, p. 7.)

Mr. Hill also petitioned the City Council to improve King street and Washington street upon this tract of land, and according to the plat he had executed. (Record, 100, 153, 154.)

Assessment was made upon the property benefited to pay for said improvement of Weller street, in accordance with the then existing charter of the City of Seattle, which provided that the cost of local improvements should be assessed upon abutting property according to valuation. (Record, p. 4.) This assessment was attacked in the courts and adjudged to be void. (Record, p. 8.)

Hill died on the 30th of August, 1890.

The rights of the respondents' intestate accrued from a mortgage executed by one Ben E. Snipes to John W. Thompson, dated the 30th day of January, 1892. Thompson began foreclosure proceedings on the 21st day of December, 1893, which ripened into a legal title on the 5th day of October, 1895. (Record, pp. 8, 51.)

The Legislature of the State of Washington, on the 9th day of March, 1893, passed an act authorizing the collection of assessments for local improvement by a new assessment, or re-assessment for the costs of making the same. (A copy of so much of said act as affects the questions involved in this cause may be found in the appendix.)

In the meantime, the City of Seattle had adopted what is known as the Free Holders' Charter, which was amended in 1892. This charter as amended provides for the levy and collection of assessments for local improvements by the front foot plan. (Record, pp. 11, 16 and 20.) The new assessment was thereupon made under the Act of 1893 and the freeholders' charter. It was made on the front foot plan. This assessment is the one which respondent attacked in the present suit. Said assessment had been assailed in the courts of the State of Washington, and was finally adjudged valid in the Supreme Court of the State. (Record, p. 126.)

> *Bacon vs. The City of Seattle,* 15 Wash. 701; decided on the authority of Frederick vs. Seattle, 13 Wash. 428.

The assessment in question was made by Ordinance No. 3199, and the proceedings show a compliance with all of the statutory and charter requirements. (Record, pp. 25, 54, and 156 to 169, inclusive.) We do not understand that the regularity of these proceedings is questioned, but that the respondent relies upon the broad principle that assessment by front foot plan is in contravention of the Constitution of the United States, and that the assessment is likewise void, by reason of having included in the amount charged upon the property the cost of planking a portion of the street.

Ordinance No.3267 confirming this assessment was passed on the 5th day of March, 1894. (Record, p. 165.) The bill of complaint in this case was filed July 31, 1900. Appellant demurred to the bill on the ground that, admitting all the facts in the bill of complaint, there was no cause of action stated. The Circuit Court overruled the demurrer. Appellant answered, and after plaintiff's tes-

timony was in, moved to dismiss the suit. This motion was also denied. After all the testimony was in and argued, the court decreed that the assessment was invalid, but held in its memorandum of opinion that Weller street had been duly dedicated and was a public street across the tract of land in question.

From the order overruling the demurrer, and from the refusal to dismiss the action, and from that part of the decree declaring the assessment invalid, this appeal has been prosecuted.

An appeal was taken from the decree of the Circuit Court to the Circuit Court of Appeals, Ninth Circuit. The respondent moved to dismiss said appeal upon the ground that said Circuit Court of Appeals had no jurisdiction thereon. In dismissing said appeal, the Circuit Court of Appeals said: "The jurisdiction of the Circuit Court in this case was invoked, not upon the ground of diverse citizenship of the parties, but upon the ground that the case directly involved the construction of the 5th and 14th Amendments of the Constitution of the United States, in that, as alleged in the bill, the appellant, The City of Seattle, in a proceeding to appropriate a part of an unplatted tract of land for use as a public street, without compensation to the owner, and creating a lien upon the owners of other land abutting on said street, deprived the appellee of his property without due process of law."

The City of Seattle v. Thompson, 114 Fed. Rep. 96.

SPECFICATION OF ERRORS.

Appellant submits the following specification of errors:

1. The court erred in overruling the demurrer to the bill of complaint.

2. The court erred in refusing to dismiss the bill of complaint, and the action brought by complainant, at close of complainant's testimony, on the ground that plaintiff had not established any right of action against the respondent, or shown any ground for relief.

3. The court erred in decreeing that the assessment and re-assessment proceedings taken by the City of Seattle against the lands of complainant were null and void and of no effect, and that the lien claimed by the City of Seattle against said lands to defray their proportionate part of the cost of improving Weller street is invalid, and in granting an injunction restraining the City of Seattle and its officers from enforcing the collection of said assessment.

The errors assigned naturally give rise to the following legal questions, arising upon the pleadings and the evidence introduced herein:

1. Did the acts of W. C. Hill and wife operate as a dedication of Weller street across the tract of land in question, and if so, is respondent's administrator bound by said dedication?

2. Was the City of Seattle authorized by the act of the Legislature of March 9, 1893, and its freeholder charter to re-assess the cost of grading and sidewalking of Weller street upon the respondent's land, according to the front foot method?

3. Is the front foot method of levying assessments to pay the cost of local improvements in contravention of the Federal constitution; and,

4. If the next preceding query is answered in the affirmative, has the respondent pursued the proper remedy?

I.

DEDICATION OF WELLER STREET.

The learned trial Judge, upon the hearing on the merits, found that Weller street was a legally dedicated street across the land in question. (Record, p. 131.) The appellant would probably be justified in passing this question without any further comment, because no error is predicated upon that ruling of the court at the final hearing. The bill of complaint alleges the following facts in regard to this dedication:

"In the month of May, 1889, said W. C. Hill, however, signed and acknowledged before a notary public a town plat embracing the one hundred acres of land in question, and afterwards in said month of May, 1889, submitted the same to the City Council of said City of Seattle, and said City Council then and there approved said plat. Said plat was then taken by said W. C. Hill from said City Council, but neither he nor any other person ever filed the same for record in the Auditor's office of said King County. That none of the lands embraced within said plat were ever sold according to said plat. Said plat was called the 'W. C. Hill Addition to the City of Seattle,' and as it appears upon the face thereof, the land was divided into lots and blocks. There was laid out on said plat a street called Weller street, which coincided, for all practical purposes with Weller street as later laid out on said plate of Ben E. Snipes and wife, filed as aforesaid." (Record, pp. 9 and 10.)

The demurrer to the bill of complaint was overruled solely upon the ground that the facts above alleged did not constitute a common law dedication. Upon that point the lower court in its memorandum of decision on demurrer, says:

"I hold that city government has no right to appropriate any part of an unplatted tract of land for use as a public street without compensation to the owner, and creating a lien upon the owner's other land abutting upon the street projected in that manner for the expense of grading the street and building sidewalks. (See Crowley vs. The City of Spokane, 99 Fed. Rep. 842.) For this reason the demurrer must be overruled." (Record, p. 36.)

The bill of complaint shows in addition to the foregoing that Hill petitioned the Council for the improvement of Weller street across the tract of land in question, by grading and sidewalking. It shows that said petition was granted by the City Council and a contract awarded for the making of the improvement and the completion of the improvement prior to the 12th day of March, 1891. From these facts, the intention to dedicate and an acceptance by the city clearly appears. Under all authorities, those facts are sufficient to constitute a valid common law dedication.

Elliott on Roads and Streets, Chap. V., p. 85.
Dillon on Mun. Corp., 4th Ed., Vol. 2, Chap. XVII., p. 737.
5 Am. & Eng. Enc. of Law, Dedication, p. 395.
New Orleans v. U. S., 10 Peters, 662.
City of Cincinnati v. White, 6 Peters 431.
Godfrey v. City of Alton, 12 Ill. 29.
Surgeant v. Bank, 4 McLean (C. C.) 339.

An incomplete statutory dedication may become one at common law by acceptance by the public.

Fulton v. Mehrenfeld, 8 Ohio St. 440.
Maywood Co. v. Village of Maywood, 6 N. E. Rep. 866.

The owner is precluded from revoking such dedication.

Cincinnati v. White, supra.
61 Am. Dec. 221.
Heirs of David v. New Orleans, 79 Am. Dec. 586.
People v. Jones, 6 Mich. 176.

Privies in estate are bound to the same extent as grantors.

Warren v. Town of Jackson, 15 Ill. 236.
See also *Kenyon v. Knipe,* 2 Wash. 394.
Tilzie v. Haye, 8 Wash. 187.
Schettler v. Lynch, 64 Pac. Rep. 955.

The question as to whether the plat of W. C. Hill's Addition to the City of Seattle operated as a dedication of the streets and alleys shown thereon, including Weller street, has been before the Supreme Court of the State of Washington, and that court has held that said acts constituted a dedication of the streets and alleys shown upon the plat for the use of the public.

City of Seattle vs. Hill, 23 Wash. 92.

Another reason for overruling the demurrer suggested in the court's memorandum of opinion was, that certain planking upon the street was improperly charged against respondents' property.

There is no showing in the complaint that there was any additional cost to the abutting property by reason of the planking. It cannot be successfully claimed that an assessment is void and property escape the cost of improvement because in prosecuting it it was discovered it would be more economical and better for the property owners to put down a few yards of planking than to make a heavy and unnecessary earth filling.

But admitting that some work was improperly included, that would not vitiate the assessment. The authorities are very decided on that point. "Such assessment is not necessarily void because it includes items which should have been excluded; it may be valid in part."

Cincinnati v. Anchor White Lead Co., 44 Ohio St. 243.

"A street assessment which includes the cost of more work than had been authorized is not wholly void. It is good for the work properly included."

Dyer v. Scalmanini, 69 Cal. 637.

The fact that an improper item of cost was included in the assessment should not vitiate the entire assessment. The statute under which this re-assessment was made provides a reasonable and proper method in which objections to such items should be presented. That statute provides for the publication, in an official newspaper, a notice that such an assessment roll is on file, the date of filing of same, the time at which the council will hear and consider objections thereto by the parties aggrieved by such assessment. It likewise gives any person who has filed objections to such new assessment or re-assessment the right to appeal to the Superior Court of the State or county in which said city or town is situated. The proper time for objections to be presented against any item improperly included in the amount of the assessment is before the council, in pursuance of such notice. Should any one be dissatisfied with the assessment, and who has presented exceptions thereto failed to appeal to the proper court, his right to object to any such item is forever lost.

Tumwater vs. Pix, 18 Wash. 153.

New Whatcom vs. Bellingham Bay Imp. Co., 16 Wash. 131.

Annie Wright Seminary vs. Tacoma, 23 Wash. 109.

However this point may be, upon a consideration of the bill of complaint alone, it is eliminated in considering the case upon its merits. Paragraphs 5 and 6 of the bill of complaint (Record, p. 4), allege that the expense of the elevated roadway and the planking was assessed on the property abutting on said improvement. Paragraph 6 of the answer (Record, p. 40) "denies that it (the City of Seattle) at any time attempted to assess and levy, or that it did assess and levy, the whole cost of said improvement upon the property abutting thereon, but alleges the fact to be that the bridge begun by the above named contractor under the first contract entered into, as aforesaid, was removed, and the cost of materials furnished, labor performed thereon and the cost of removing said materials were all paid out of the road fund of said city. Respondent expressly denies that any part of the expense of erecting the said elevated roadway or bridge or of the removal of the same, or the cost of any of the materials used or labor employed thereon, was assessed in whole or in part to any of the property abutting on said improvement." Respondents introduced no testimony in support of the allegations of their complaint upon this point, and as the case now stands said allegations are not sustained.

In its memorandum of decision on the merits, the Circuit Court further says: "In the first place, the law in force at the time of doing this work did not authorize the city government to make the cost of planking streets a charge upon the abutting property."

The only law governing the case was an act of the State Legislature entitled, "An Act to revise and amend the charter of the City of Seattle," approved in 1886, and in force at the time Weller street was ordered improved. Section 8 of that act is as follows: "The City of Seattle shall have power to construct sidewalks and to curb, pave, grade, macadamize and gutter any street * * * and to levy and collect special taxes or assessments on all lots

and parcels of land fronting on any such street * * * so improved, or any part thereof sufficient to pay the expense of such improvement."

Webster defines "paving" as follows: "To lay or cover with stone, brick or other material, so as to make a firm, level, or convenient surface for horses, carriages or persons on foot to travel on."

The power to pave with any material certainly included the power to pave with wood, for that is what planking a roadway is, and especially in the country where wood is always understood to be the material used unless some other is specifically designated.

II.

We are unable to find from the record whether the right to make a re-assessment by a different method than that in force at the time the original assessment, has been seriously considered. Not having taken part in the original trial of this case, the writer of this brief is in the dark as to some of the points raised and discussed at that trial. If that question ever was a point in the case, we submit that it is settled by the decision of this Court in the case of Village of Norwood vs. Baker, 172 U. S. 293. In the course of its opinion in that case, this Court says: "Its legal effect, as we now adjudge, was only to prevent the enforcement of the particular assessment in question. It left the village, in its discretion, to take such steps as were within its power to take, either under existing statutes or under any authority that might thereafter be conferred upon it, to make a new assessment upon the plaintiff's abutting property for so much of the expense of opening the street as was found upon due and proper inquiry to be equal to the special benefits accruing to the property."

The Supreme Court of the State of Washington has passed upon this point in conformity with our contention.

Wilson vs. Seattle, 2 Wash. 543.

III.

Several methods of assessment for local improvements have been adopted throughout different sections of the United States. All have been more or less the object of adverse criticism. The method of assessing according to the front footage has been adopted by many of the states and leading cities of the Union, and experience shows that that method as nearly conforms to equity and justice as any that has ever been tried. It would be impossible to adopt any method which would not in certain isolated cases appear to be more or less unequal, but that fact does not render such assessment void. "It would be in any case impossible to accurately adjust the burden upon respective property holders in proportion to the benefit of the individual property of each and that power in practice might be woefully abused."

The question of adopting a method of levying assessments for local improvements lies purely in legislative discretion, and so long as that discretion is exercised in a reasonable manner, and gives parties interested an opportunity to be heard with the right to appeal to the courts from the determination of the city council, it cannot be said that there is a violation of the 14th Amendment of the Constitution of the United States. The Act of March 9, 1893, under which the assessment in question was made, provides for the publication of a notice in the official newspaper that the assessment roll is on file, the date of filing the same, the time at which the council will hear and consider objections thereto, and gives the owner or owners of any property affected thereby the right to file objections within ten days from the last publication thereof. At the time of hearing, the council shall hear and determine all objections which have been filed to the regularity of the proceedings, the correctness of the amount or of the

amount levied on any particular lot or parcel of land. The council also has authority to adjourn from time to time, and to revise, correct, confirm and set aside or to order the assessment or a writ to be made *de novo*. A simple method of appeal from the determination of the council to the Superior Court of the State is provided, and from the adjudication of the Superior Court an appeal lies to the Supreme Court of the State. It cannot be said that such a statute is arbitrary or will operate to deprive a person of his property without due process of law.

This case was heard by the Circuit Court while the country was still misunderstanding the effect and misconstruing the decision of the United States Supreme Court in the Village of Norwood case. How decidedly and logically that misconception has been cleared away by the series of decisions reported in 181 U. S. Rep. is well known to this Court. Only a slight reference to them is necessary; but for convenience the pertinent paragraphs of the syllabus is given in each case:

"It was not the intention of the Court in Norwood vs. Baker, 172 U. S. 269, to hold that the general and special taxing systems of the States, however long existing and sustained as valid by their courts, have been subverted by the Fourteenth Amendment to the Constitution of the United States; but the purpose of that amendment is to extend to the citizens and residents of the States the same protection against arbitrary state legislation, affecting life, liberty and property, as is afforded by the Fifth Amendment against similar legislation by Congress."

Tonawanda vs. Lyon, 181 U. S. Rep. 389.

"A constitutional right against unjust taxation is given for the protection of private property, but it may be waived by those affected, who consent to such action to their property as would otherwise be invalid.

"The order of publication gave due notice of the filing of the petition in this case, and an opportunity to all persons interested to show cause why the prayer of the petition should not be granted; and operated as a notice to all concerned of the pending appointment of a jury, and that proceedings would be had under the act of Congress.

"The Court of Appeals, in regarding the decision of Norwood vs. Baker, 172 U. S., as overruling previous decisions of this court in respect to Congressional legislation as to public local improvements in the District of Columbia, is overruled."

Wright vs. Davidson, 181 U. S. Rep. 371.

"In this case the court proceeds on the assumption that the legal import of the phrase 'due process of law' is the same, both in the Fifth and in the Fourteenth Amendments to the Constitution of the United States; and that it cannot be supposed that it was intended by the Fourteenth Amendment to impose on the States, when exercising their powers of taxation, any more rigid or stricter curb than that imposed on the Federal Government by the Fifth Amendment in a similar exercise of power.

"It was not the intention of the Fourteenth Amendment to subvert the systems of the States pertaining to general and special taxation; that Amendment legitimately operates to extend to the citizens and residents of the States the same protection against arbitrary state legislation affecting life, liberty and property as is afforded by the Fifth Amendment against similar legislation by Congress, and the Federal Courts ought not to interfere when what is complained of is the enforcement of the settled laws of the State, applicable to all persons in like circumstances and conditions, but only when there is some abuse of law, amounting to confiscation of property, or deprivation of personal rights.

"The conclusions reached by this court in many cases cited and summarized by the Court in its opinion are thus stated by two writers (Cooley and Dillon), whose views

this Court adopts: 'The major part of the cost of a local work is sometimes collected by general tax, while a smaller portion is levied upon the estates specially benefited. The major part is sometimes assessed on estates benefited, while the general public is taxed a smaller portion in consideration of a smaller participation in the benefits. The whole cost in other cases is levied on lands in the immediate vicinity of the work. In a constitutional point of view, either of these methods is admissible, and one may sometimes be just, and another at other times. In other cases it may be deemed reasonable to make the whole cost a general charge, and levy no special assessment whatever. The question is legislative, and, like all legislative questions, may be decided erroneously; but it is reasonable to expect that, with such latitude of choice, the tax will be more just and equal than it would be were the legislature required to levy it by one inflexible and arbitrary rule.'

"The courts are very generally agreed that the authority to require the property specially benefited to bear the expense of local improvements is a branch of the taxing power, or included within it * * * Whether the expense of making such improvements shall be paid out of the general treasury or be assessed upon the abutting or other property specially benefited, and, if in the latter mode, whether the assessment shall be upon all property found to be benefited, or alone upon the abutters, according to the frontage or according to the area of their lots, is, according to the present weight of authority, considered to be a question of legislative expediency.

"Norwood vs. Baker, 172 U. S. 269, considered, and held not to be inconsistent with these views."

French vs. Asphalt Paving Company, 181 U. S. Rep. 325.

The United States Supreme Court has been quite consistent in its sanction of the front foot method, and the decision in the Village of Norwood case was both just in itself and in harmony with its other decisions. There is a

great difference between the case of taking land from an unwilling owner in order to make a public street, and the case of grading and planking it afterward for the benefit of homes and business houses to which the improvement gives access.

There is nothing in the front foot method repugnant either to the Constitution of the United States, to the State constitutions and laws, to the decisions of the courts or to the conclusions of practical experience.

The United States Supreme Court long ago gave its approval to statutes authorizing the front foot method; and, coupling with it the dictum that the method of levying an assessment for improvements was a matter wholly within the power of State Legislatures, gave its sanction to a now widespread and long-established custom.

In the case of Walston vs. Nevin (128 U. S. Reports, 580), 1880, that court had under review a statute of the Commonwealth of Kentucky, 1882, in which it was enacted:

"Sec. 2. When the improvement is the construction of any street, road, lane, alley, or avenue, such improvement shall be at the exclusive cost of the owner of lots in each fourth of a square, to be equally apportioned by the general council *according to the number of square feet owned by them respectively*, except that corner lots (say thirty feet front and extending back as may be prescribed by ordinance) shall pay twenty-five per cent. more than others for such improvement. Each subdivision of territory bounded on all sides by principal streets shall be deemed a square."

Chief Justice Fuller, delivering the decision, said:

"The statute has been *repeatedly* before the Kentucky Court of Appeals, which has sustained it as constitutional and proper legislation, the powers vested thereby in the

local improvement being subjected to the supervision of the courts."

This was in direct comment upon the plea that such a method was in conflict with Section 1 of the Fourteenth Amendment of the United States Constitution.

The United States Supreme Court, in the case of Walston vs. Nevin, 128 U. S. Reports, p. 582, quoted at length from Mr. Justice Miller, in Davidson vs. New Orleans, 96 U. S. 97-104, as saying that:

"Whenever by the laws of a state, or by state authority, a tax, assessment, servitude, or other burden is imposed on property for public use, whether it be for the whole state or of some limited portion of the community, and those laws provide for a mode of confirming or contesting the charge thus imposed, in the ordinary court of justice, with such notice to the person, or such proceedings in regard to the property as is appropriate to the nature of the case, the judgment in such proceedings cannot be said to deprive the owner of his property without due process of law, however obnoxious it may be to other objections."

And the conclusion was reached, said Chief Justice Fuller, in comment thereon, that neither the corporate agency by which the work is done, the *excessive price which the statute allows therefor nor the relative importance of the work, the value of the land assessed,* nor that the *assessment is unequal as regards the benefits conferred* are matters in which the State authorities are controlled by the Federal Constitution. So the determination of the taxing district and the manner of the apportionment are all within the legislative power.

Spencer vs. Merchant, 125. U. S. 345.
Stanley vs. Supervisors, 121 U. S. 535-550.
Mobile vs. Kimball, 102 U. S. 591.

Hagar vs. Reclamation District, N. O. 108, 111 U. S. 107.

United States vs. Memphis, 97 U. S. 284.

Laramie vs. Albany Co., 92 U. S. 307.

It is worth noting that Chief Justice Fuller went so far as to say:

"The remedy for abuse is in the State courts, for, in the language of Mr. Justice Field in Mobile vs. Kimball, 'This court is not the harbor in which the people of a city or county can find a refuge from ill-advised, unequal, and oppressive State legislation.'"

"But neither is taxation for a public purpose, however great, the taking of public property for public use, in the sense of the Constitution. Taxation only exacts a contribution from the individuals of the State or of a particular district, for the support of the government, or to meet some public expenditure authorized by it, for which they receive compensation in the protection which government affords, or in the benefits of the special expenditure. But when private property is taken for public use, the owner receives full compensation. In the one case, the party bears only a share of the public burden; in the other, he exchanges his property for its equivalent in money. The two things are essentially different."

County of Mobile vs. Kimball, 102 U. S. 703 (1880).

"It is insisted that the basis of the assessment upon the lands benefited, for the cost of the construction of the work, is not in accordance with, and in proportion to, the benefits conferred by the improvement; and therefore there is a violation of the constitutional amendment referred to, and a taking of the property of the citizen without due process of law. Although there is a marked distinction between an assessment for a local improvement and the levy of a general tax, yet the former is still the exercise of the same power as the latter, both having their source in the sovereign power of taxation. Whatever ob-

jections may be urged to this kind of assessment, as being in violation of the State constitution, yet, as the State court has held them to be without force, we follow its judgment in that case, and our attention must be directed to the question whether any violation of the Federal Constitution is shown in such an assessment. Can an *ad valorem* assessment on the land benefited, or, in other words, can such an assessment as is provided in Secs. 18, 20, 21, and 22 of the act be legally levied in such a case as this?

"Assumed that the only theory of these assessments for local improvement upon which they can stand is that they are imposed on account of the benefits received, and that no land ought, in justice, to be assessed for a greater sum than the benefits received by it, yet it is plain that the fact of the amount of benefits is not susceptible of that accurate determination which appertains to a demonstration in geometry.

"Some means of arriving at this amount must be used, and the same method may be more or less accurate in different cases involving different facts. Some choice is to be made, and where the fact of some benefit accruing to all the lands has been legally found, can it be that the adoption of an *ad valorem* method of assessing the lands is to be held a violation of the Federal Constitution? It seems to us clearly not. It is one of those matters of detail in arriving at the proper and fair amount and proportion of the tax that is to be levied on the land, with regard to the benefits it has received, which is open to the discretion of the State Legislature, and with which this court ought to have nothing to do. The way of arriving at the amount may be in some instance inequitable and unequal, but that is far from rising to the level of a constitutional problem, and far from a case of taking property without due process of law."

Fallbrook Irrig. Dist. vs. Bradley, 164 U. S. 176.
Parsons vs. Dist. Columbia, 170 U. S. 51.

"The rule of apportionment among the parcels of land benefited also rests within the discretion of the Legisla-

ture, and may be directed to be in proportion to the position, the frontage, the area, or the market value of the lands, or in proportion to the benefits."

Mattingly vs. Dist. of Columbia, 97 U. S. 687.
Spencer vs. Merchant, 125 U. S. 345.
Walston vs. Nevin, 128 U. S. 578.
Shoemaker vs. United States, 147 U. S. 282.
Paulsen vs. Portland, 149 U. S. 30.
Fallbrook Dist. vs. Bradley, 164 U. S. 176.

(All of these citations are made in Bauman vs. Ross, 167 U. S. 590, with approval.)

"Neither the corporate agency by which the work is done, nor the relative importance of the work, nor that the assessment is unequal as regards the benefits conferred, are matters in which the State authorities are controlled by the Federal Constitution."

Davidson vs. New Orleans, 96 U. S. 97.

"The bill charges (p. 689) that assessments according to the frontage of the street were unauthorized and illegal. Congress may legislate within the district, respecting the people and property therein, as may the Legislature of any State over any of its subordinate municipalities. There were also acts of the legislative assembly of the district, which very forcibly imply a confirmation of the acts and assessments of which the bill complains.

"Special assessments for street improvements very often are oppressive. But that the legislative power may authorize them, and may direct them to be made in proportion to the frontage, area, or market value of the adjoining property, at its discretion, is, under the decisions, no longer (1878) open to controversy."

Mattingly vs. Dist. of Columbia, 97 U. S. 687.

"The enactment by Congress that assessments levied for laying water mains in the District of Columbia should

be at the rate of $1.25 *per lineal front foot* against all lots or land abutting upon the street, road, or alley in which a water main shall be laid, is conclusive alike of the necessity of the work and of its benefit as against abutting property.

"If the assessment for laying such water mains exceeds the cost of the work it is not thereby invalidated."

Parsons vs. Dist. of Columbia, 170 U. S. 45.

"The police power of a State is as broad and plenary as the taxing power (as defined in Coe vs. Errol, 116 U. S. 517), and properly within the State is subject to the operation of the former as long as it is within the regulative restriction of the other."

Kidd vs. Parsons, 128 U. S. 1.

"It has been said that the benefits derived from the grading and paving of a street are sometimes fanciful and imaginary, and always uncertain and incapable of being estimated with that exactness which is necessary for the purpose of justice to the individuals assessed. But this is a consideration to be addressed to the Legislature, and not to the judicial authorities. The courts cannot assume that this proposition is true in point of fact. The Legislature has evidently acted on the belief that it is untrue. That mistakes may have happened, and that abuses may have been practiced, and that injustice may have been done in making street assessments, it is not necessary to deny. Mistakes, abuses, and injustice have often occurred in general taxation. These are not grounds on which either system of supplying the public treasury can be denounced as unconstitutional. If the systems are imperfect, they should be reformed by the Legislature. If street assessments are in their practical operation oppressive and unjust, the statutes which authorize them should be repealed. The remedy for unjust or unwise legislation is not to be administered by the courts. It remains in the hands of the people; and it is to be wrought out by means of

a change in the representative body, if it cannot be otherwise obtained."

People vs. Mayor of Brooklyn, 55 Am. Dec. 276.

"This subject (mode of assessment) has been treated at some length elsewhere in this work, but Judge Dillon, after a careful review of the authorities, has so admirably and concisely stated the law governing this system or mode of assessment for street improvements, that it cannot be out of place to give the result of his investigation in his own words: 'When not restrained by the Constitution of the particular State, the Legislature has a discretion commensurate with the broad domain of legislative power in making provisions for ascertaining what property is specially benefited and how the benefit shall be apportioned. The assessments may be made upon all the property specially benefited by the particular improvement according to the exceptional benefit each lot or parcel of property actually and separately receives.

"Where the property is urban, and has been platted into blocks, with lots of equal depth which abut the local improvement for which the assessment is made, and there are no special constitutional restrictions in the way, and nothing in the nature and circumstances of the particular case to make an assessment in proportion to the frontage of the lots upon the improvement work manifest injustice, it is generally, but not always, regarded as within the competency of the Legislature to provide that it may be so made."

24 A. & E. Encycl. of Law (1st Ed.), 71.

"All the streets have been made many years prior to the incorporation of the city; most of them had been graded and paved prior to the year 1826, and always in the mode now objected to as unconstitutional. Other cities in the United States, as well as in Europe, have been improved in a similar manner; this mode and this usage, in towns and cities, may have been generally understood when our Constitution was adopted. The Eleventh Sec-

tion of the charter of Lexington only re-enacted what had been the established rule respecting its streets and sidewalks. The citizens were familiar with that rule, and, thus understanding it, they accepted the charter as it is.

"Under a proper view of all the foregoing considerations, can this court decide that the ordinance now sought to be invalidated is unconstitutional and void? (The mode of apportionment was by the front foot.)

City of Lexington vs. McQuillan, 35 Am. Dec. 161 (Ky.).

"This part of the plaintiff's case rests on the broad proposition that the Legislature have no power to authorize the assessment of the cost of a work of a public nature, but the construction of which will be of special and peculiar benefit to adjacent property on the abutting estates in proportion to their value. For the reasons already given, we are of opinion that such a tax is neither unreasonable nor unproportional, and that it was competent for the Legislature to impose it in the mode prescribed by the statute.

"We are greatly strengthened in this conclusion by the consideration that such a mode of assessment of taxes for similar objects has been adopted and carried into effect *without doubt or question* in this commonwealth, both under the colonial government and since the adoption of the constitution."

Dorgan vs. City of Boston, 94 Mass. (12 Allen), 238.

The eminence of the court adds value to this opinion.

It is admitted that in some states it has been held that the front-footage rule of assessments is unconstitutional as a violation of the constitutional provision requiring equality and uniformity in taxation. But the greatest authority upon constitutional questions in this country, Thomas M. Cooley, has laid down a principle, based upon sound rea-

soning, which has been adopted so generally that it has become a part of the Common Law of the United States. He says:

"In local taxation, however, for special purposes, the local benefits may in many cases be seen, traced and estimated to a reasonable certainty. At least this has been supposed and assumed to be true by the Legislature, whose duty it is to prescribe the rules on which taxation is to be apportioned, and whose determination of *this matter*, being within the scope of its lawful power, is conclusive."

Cooley on Const. Limitations, 6th Ed., p. 623.

"Where the Legislature has invested a municipal body with power to provide by ordinance for assessing the cost of an improvement upon the property benefited, if such body adopts the rule of frontage as the rule of apportionment, the courts cannot, without statutory authority to do so, interfere with the determination, unless a clear case of abuse is made out."

Baltimore vs. Johns Hopkins Hospital, 56 Md. 1; overruling *Baltimore vs. Scharf*, 54 Md. 499.

Judge Cooley cites with approval the decision of the Ohio court in Northern Indiana R. R. Co. vs. Connelly, 10 Ohio St. 159, in which it is held:

"The rule of apportionment, whether by the front foot or a percentage upon assessed valuation, must be uniform, affecting all the owners and all the property abutting on the street alike. * * * It is manifest that the actual benefits resulting from the improvement may be as various almost as the number of the owners, and the usage to which the property may be applied. * * * The Legislature have not attempted so vain a thing." * * *

Judge Cooley follows this up by saying (Const. Lim., p. 624):

"And on the like reasoning, it has been held equally competent to make the street a taxing district, and assess

the expense of the improvement upon the lots in proportion to the frontage. Here also is apportionment by a rule which approximates to what is just, but which, like any other rule that can be applied, is only an approximation to absolute equality. But if, in the opinion of the Legislature, it is the proper rule to apply to any particular case, the courts must enforce it."

Judge Cooley goes on to show that the method of fairest apportionment, according to outward appearance, would be to assess against each lot the cost of the work in front of that particular lot, but, he says, "it requires but slight examination to discover that it is a deceptive semblance only, and that the measure of equality which the Constitution requires is entirely wanting. * * * It would be nakedly an arbitrary command of the law to each lot owner to construct the street in front of his lot at his own expense, according to a prescribed standard; and a power to issue such command could never be exercised by a constitutional government unless we are at liberty to treat it as a police regulation, and place the duty to make the streets upon the same footing as that to keep the sidewalks free from obstruction and fit for passage." He adds, and we consider it fair to call attention to this fact, without endorsing it, that "any such idea is clearly inadmissible."

In addition to the foregoing authorities, the Court's attention is invited to the following decisions of state courts of last resort and expressions of text writers:

2 Dillon Municipal Corporations, 2nd Ed., Sec. 761.
Elliott on Roads and Streets, pp. 391-392.
Cooley on Taxation, 2nd Ed., p. 644.
Whiting vs. Townsend, 57 Cal. 515.
Emory vs. San Francisco Gas Co., 28 Cal. 345.
Hayden et al. vs. City of Atlanta, 70 Ga. 817.
Bacon vs. Mayor of Savannah, 32 A. & E. Corpn. Cs. 244.

Springfield vs. Green, 120 Ill. 269.
Palmer vs. Stumph, 29 Ind. 337.
Amery vs. Keokuk, 72 Iowa, 701.
Baltimore vs. Johns Hopkins Hospital, 56 Me. 1.
Sheley vs. Detroit, 45 Mich. 431.
Farrar vs. St. Louis, 80 Mo. 379.
Sigler vs. Fuller, 34 N. J. L. 232.
O'Reilly vs. Kingston, 114 N. Y. 439.
Roberts vs. First Nat. Bank, 8 N. D. 504.
Upington vs. Treasurer, 24 Ohio St. 232.
King vs. City of Portland, 2 Ore. 147.
McGee vs. Commonwealth, 46 Pa. 538.
Harrell vs. Storrie, 47 S. W. 838.
Davis vs. Lynchburg, 84 Va. 861.
Austin vs. Seattle, 2 Wash. 669.
Weeks vs. City of Milwaukee, 10 Wis. 243.

The foregoing are only a few of the cases from the states bearing upon the question at issue.

IV.

The Act of March 9, 1893, provides that the decision of the city council shall be a final determination of the regularity, validity and correctness of the reassessment, and provides for an appeal from that decision. In case any property owner is dissatisfied with the assessment, it is incumbent upon him to file his objections with the council and appeal from their determination to the Superior Court. In case he fails to do this, the assessment will stand as against his property.

Nearly seven years intervened from the time this assessment was made, and nine years from the time respondent's rights attached to the land before this proceeding was instituted. Respondent had full notice that the

streets had been improved and had constructive notice that the cost of said improvement had not been paid by the abutting property. It would be inequitable and unjust now to allow him to escape the payment of this cost when he has received the benefit of the work.

In a Washington case between the City of Seattle and the grantor of the present respondent, covering the same tract of land and relating to a parallel street, the Supreme Court of that State said:

"It is clear that the common council possessed jurisdiction to order the improvement and levy the assessment, and it appears that all the notices required by the general ordinances to be given to property owners were published in the official newspapers of the city for the required time. In view of these facts and the provisions of Section 10 of the charter, it would seem that the assessment was properly held valid, 'notwithstanding any defect, informality, or irregularity in the proceedings.'

"And, besides, we are of the opinion that the appellants ought not to be heard to complain of defects and irregularities in the assessment proceedings. The party through whom they derived whatever title they have to the land was actively instrumental in inducing the proceedings which are now called in question, and it is not shown anywhere in the record that he ever made the slightest objection to the mode of levying the assessment, or the amount thereof, or even to the character of the work.

"It is not necessary at this time to determine whether the mere failure on the part of one whose land is being assessed for a local improvement, and who has not himself requested the municipality to make it, to object to the proceedings at the proper time, will preclude him from afterwards objecting, as some courts seem to have held, for that question is not properly in this case. But we are constrained to hold that, after a person has signed a petition for an improvement, which can only be paid for by means of an assessment on contiguous property, he is estopped

from contesting the validity of the assessment, especially after the work has been completed and accepted by the proper authorities.

Cooley, Tax'n, p. 819.
Ball vs. Tacoma, 9 Wash. St. 592, 38 Pac. 133.
Motz vs. City of Detroit, 18 Mich. 495.
Wood vs. Norwood Tp., 52 Mich. 32, 17 N. W. 229.
Ricketts vs. Spraker, 77 Ind. 371.
Patterson vs. Baumer, 43 Iowa 477.
Ferson's Appeal, 96 Pa. St. 140.
Elliott, Roads & S., 423.

"It will be seen from what we have said that at the time these appellants acquired their title to the land in controversy there was a valid assessment against it appearing of record, and of which they may be deemed to have had at least constructive notice. They received the benefits resulting from the improvement, and must be held to have taken the land subject to the consequent burden."

City of Seattle vs. Hill, 62 Pac. 448.

The Supreme Court of the State of Indiana in Evansville vs. Pfisterer, 34 Ind. 36, 7 Am. Rep. 214, uses the following language:

"And in such cases the party who makes the complaint must apply to the courts as soon as the facts come to his knowledge, showing that a tax about to be levied, or an assessment for an improvement about to be made, is illegal. He must not sleep on his rights; he can not lie quietly by and knowingly let work be done for which a tax will be levied or an assessment made, and after the work is completed and his property thereby improved, come into a court of equity and obtain relief against the tax or assessment because the same is illegal or void. He is estopped by his negligence and laches."

Elliott on Roads and Streets, pages 420, 421, says:

"If he (the property owner) has knowledge of the proceedings, and knows that the work is being done under

them, he can not avoid knowing what the law authorizes, and if he knows all this he ought to properly object or else pay the assessment, unless subsequent acts made it invalid. The fact that a street is being improved by public officers ought to put the owner on inquiry, and to him should be applied the familiar rule that one put upon inquiry is chargeable with notice of all the facts which a reasonably diligent investigation will disclose. Public works are undertaken, as every one knows, under authority delegated by law to the public officers, and there is little or no reason why a particular owner, who has full notice of what is being done, should be allowed to stand by in silence until the work is completed, and then escape paying for the benefit his property has received. If he would avoid this result he should act promptly, and if he fails he should not demand that the persons who have done the work should go unpaid."

The Supreme Court of Massachusetts, in the case of Tash vs. Adams, 10 Cush. 252, uses almost the same language as in Evansville vs. Pfisterer, *supra:*

"It would certainly be inequitable and unjust to allow one to sleep on his right, with full knowledge of all that was being done, and that his property was being improved and benefited, and then, after the improvement was completed and his property benefited thereby, and expense had been incurred which must necessarily be met and paid from some source or other, to come into a court of equity and say: 'It is true I knew all that was going on, that my property was being benefited by the improvement being made, that I made no objection whatever, that I am willing to accept all benefits incurred, but I am not willing to pay therefor, because, forsooth, the proceedings under which the improvements were made were not strictly legal, and the public officers did not follow and strictly comply with the law authorizing such improvements to be made; therefore I ask the Court, as a matter of equity and justice, to relieve me from the payment of the whole and every part of the assessment levied on my said property.'"

The Supreme Court of Washington has adopted the same doctrine as the cases above cited and has spoken in no uncertain terms in a similar case, that of Wright vs. City of Tacoma, 19 Pac. Rep. 45. The Court says:

"After the city had entered into contract, the work would be done at all events, and at the expense of all taxpayers within the city, if not done under these proceedings. Thus, appellant, by remaining silent when good faith would require him to speak, would gain the advantage of having his street improved at the expense of others. This would be a moral fraud.

"In Powers vs. New Haven, 120 Ind. 185, the Court said: 'It is now quite settled that if the owner of property in a city stands by and permits improvements to be made which benefits such property, and makes no objection to such improvement, he will be estopped from denying the authority of such city to make the improvements.'"

Taber vs. Ferguson, 109 Ind. 227.
Ross vs. Stackhouse, 114 Ind. 200.
Jenkins vs. Stetler, 118 Ind. 275.
Johnson vs. Allen, 62 Ind. 57.

"It would be inequitable to permit a party to stand by and permit others to make improvements for the benefit of his property, without objection, and hold such benefits and refuse to pay for the same. We see no reason why the doctrine should not be applied to improvements made in towns as well as cities."

11 A. & E. Encycl. of Law, 2d Ed., 429.

V.

The recent case of Hibben v. Smith, in which a decision was handed down by this court Nov. 30, 1903, seems to be conclusive of all of the questions involved in the case at bar. In that case, as in this, an assessment by the front

foot for local improvements was assailed, upon the ground that the statute under which the assessment was levied was in contravention of the 14th Amendment of the Federal Constitution.

The relief sought by the respondent is based solely upon the violation of the 5th and 14th Amendments of the Federal Constitution. (Paragraph 21 of complaint, Record, p. 13.)

The circuit judge, both in passing upon the demurrer to the complaint (Record, p. 36), and in its memorandum of decision on the merits (Record, p. 131), based its decisions solely upon constitutional grounds.

The statute of Washington authorizing an re-assessment gives to the parties interested a hearing, or what is equivalent thereto, an opportunity to be heard after notice; and also an appeal to the Superior Court, and from this to the Supreme Court of the State. The statute construed in Hibben v. Smith, *supra*, so far as we are able to judge from the opinion, gave property owners an opportunity for hearing before the city authorities, but not an appeal to the courts. In this respect the Washington statute is a much more liberal one than that of the State of Indiana, passed upon in the above cited case. In the course of its opinion in the Hibben case, this court uses the following language: "The amount of benefits resulting from the improvement is a question of fact, and a hearing upon it being assumed, the decision of the board is final. No constitutional question of a federal nature arises therefrom."

"Due process of law is afforded where there is opportunity to be heard before the body which is to make the assessment, and the legislature of a state may provide that

such hearing shall be conclusive so far as the federal constitution is concerned."

"Due process of law is not violated, and the equal protection of the laws is given when the ordinary course is pursued in such proceedings for the assessment and collection of taxes that has been customarily followed in the state, and where the party who has subsequently been charged in his property, has had a hearing or an opportunity for one provided by the statute."

From the foregoing discussion and authorities, appellants submit that there is no federal question involved in this suit, and that for reasons herein set forth, the Circuit Court erred in rendering the decree from which this appeal is taken.

We therefore respectfully submit that the decree be reversed.

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Of Counsel.

APPENDIX.

AN Act relating to and authorizing the collection of assessments for local improvements by a new assessment or re-assessment of the cost and expense of making same in cities and towns, and declaring an emergency.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

Section 1. That whenever an assessment for laying out, establishing, closing, straightening, altering, widening, grading, regrading, paving, re-paving, planking, replanking, sidewalking and bridging, macadamizing, remacadamizing, graveling, re-graveling, piling, re-piling, capping, re-capping, any street, avenue, or alley, or for any local improvement, which has heretofore been made or which may hereafter be made by any city or town, has been or may be hereafter declared void and its enforcement under the charter or laws governing such city or town refused by the courts of this State, or for any cause whatever has been heretofore or may be hereafter set aside, annulled or declared void by any court, either directly or by virtue of any decision of such court, the council of such city or town shall, by ordinance, order and make a new assessment or re-assessment upon the lots, blocks or parcels of land which have been or will be benefited by such local improvement, to the extent of their proportionate part of the expense thereof, and in case the cost shall exceed the actual value of such local improvement the new assessment or re-assessment shall be for and based upon the actual value of the same at the time of its completion; and to this end the board of public works or other proper authority of such city or town shall make a new assess-

ment roll in equitable manner with reference to the benefits received, as near as may be in accordance with the law in force at the time such re-assessment is made, and when the same shall have been confirmed and approved by the council it shall be enforced and collected in the same manner that other assessments for local improvements are enforced and collected under the charter or laws governing such city or town; but all proceedings relative to making the expense of local improvements chargeable upon property benefited thereby, required and provided by the charter or laws of such city or town prior to the making of original assessment roll, shall not be included nor required within the purpose of this act.

Sec. 2. The city council of such city or town shall by ordinance order and make a new assessment or re-assessment, as provided in preceding section, upon the lots, blocks, or parcels of land, which have been or will be benefited by such improvement, to the extent of their proportionate part of the cost, expense and value thereof.

Sec. 3. Upon the passage of an ordinance, as hereinbefore provided, the board of public works, or other proper authority of such city or town, shall make out an assessment roll according to the provisions of the said ordinance, and shall certify the same to the council of such city or town.

Sec. 4. Upon receiving the said assessment roll, the clerk of such city or town shall give notice by three (3) successive publications in the official newspaper of such city or town, that such assessment roll is on file in his office, the date of filing of same, and said notice shall state a time at which the council will hear and consider objections to said assessment roll by the parties aggrieved by such assessment. The owner or owners of any property

which is assessed in such assessment roll, whether named or not in such roll, may within ten (10) days from the last publication provided herein, file with the clerk his objections in writing to said assessment.

Sec. 5. At the time appointed for hearing objections to such assessment, the council shall hear and determine all objections which have been filed by any party interested, to the regularity of the proceedings in making such assessment and to the correctness of the amount of such re-assessment, or of the amount levied on any particular lot or parcel of land; and the council shall have the power to adjourn such hearing from time to time, and shall have power, in their discretion, to revise, correct, confirm, or set aside, and to order that such assessment be made de novo, and such council shall pass an order approving and confirming said proceedings and said re-assessment as corrected by them, and their decision and order shall be a final determination of the regularity, validity and correctness of said re-assessment, or the amount thereof, levied on each lot or parcel of land. If the council of any such city consists of two houses, the hearing shall be had before a joint session, but the ordinance approving and confirming the re-assessment shall be passed in the same manner as other ordinances.

Sec. 6. The fact that the contract has been let or that such improvement shall have been made and completed in whole or in part shall not prevent such assessment from being made, nor shall the omission, failure or neglect of any officer or officers to comply with the provisions of the charter or laws governing such city or town, as to petition, notice, resolution to improve, estimate, survey, diagram, manner of letting contract or execution of work, or any other matter whatsoever connected with the improvement and the first assessment thereof, operate to invalidate or

in any way affect the making of the new assessment or re-assessment as provided for by this act, charging the property benefited with the expense thereof: PROVIDED, That such new assessment shall be for an amount which shall not exceed the actual cost and value of the improvement, together with any interest that shall have lawfully accrued thereon, and that such amount be equitably apportioned upon the property benefited thereby, according to the provisions of the charter or laws of such city or town. It being the true intent and meaning of this act to make the cost and expense of all local improvements payable by the real estate benefited by such improvement by making a re-assessment therefor, notwithstanding that the proceedings of the common council or board of public works or any of its officers may be found irregular or defective, whether jurisdictional or otherwise; when such reassessment is completed all sums paid on the former attempted assessment shall be credited to the property on account of which the same was paid.

Sec. 8. Any person who has filed objections to such new assessment or re-assessment, as hereinbefore provided, shall have the right to appeal to the Superior Court of this State and county in which such city or town may be situated.